SENATE JUDICIARY
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DATE 2/9/11
SB 116

Summary of Montana Supreme Court decision on Baxter et al. v. State of Montana et al., DA 09-0051, 2009 Mont. 449

In December of 2008, the District Court in Lewis and Clark County issued an Order and Decision, holding that a competent, terminally ill patient has a right to die with dignity under Article II, Sections 4 and 10 of the Montana Constitution, which address individual dignity and the right to privacy respectively. The District Court held that a patient may use the assistance of his physician to obtain a prescription for a lethal dose of medication. The patient then is free to decide to self-administer the dose and cause his own death. The District Court further held that the patient's right to die with dignity includes protection of the patient's physician from prosecution under the State's homicide statutes. The District Court concluded that Montana homicide laws are unconstitutional as applied to a physician who aids a competent, terminally ill patient in dying. That decision was then appealed to the Supreme Court.

The Supreme Court affirmed the District Court's decision, but declined to decide the case on constitutional grounds as it concluded that it was able to decide it without reaching the constitutional question. Instead, the Court determined that the case could be decided by analyzing the applicable criminal statutes.

The Court started with the proposition that suicide is not a crime under Montana law. The Court wrote that a person commits the offense of deliberate homicide if "the person purposely or knowingly causes the death of another human being . . . ." Section 45-5-102(1), MCA. It then wrote that § 45-2-211(1), MCA, establishes the consent of the victim as a defense if none of the statutory exceptions to consent 45-2-2-211(2), MCA apply. Consent is ineffective in the following situations:

> (a) it is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense;
> (b) it is given by a person who by reason of youth, mental disease or defect, or intoxication is unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense;
> (c) it is induced by force, duress, or deception; or
> (d) it is against public policy to permit the conduct or the resulting harm, even though consented to.

The Court wrote that the first three statutory circumstances require case-by-case factual determinations and it, therefore, would confine its analysis to the last exception, i.e. whether or not consent by a patient to physician aid in dying is against public policy.

The Court then spent a great deal of time analyzing whether or not there is any indication in Montana law that physician aid in dying provided to terminally

ill, mentally competent, adult patients is against public policy. The Court looked at a number of reported cases in Montana and other states in analyzing this question. In contrast to cases where violent, peace breaching conduct has been found to violate public policy even where the victim consented, the Court concluded that a physician who aids a terminally ill patient in dying is not directly involved in the final decision or the final act. The Court wrote that "[t]he patient's subsequent private decision whether to take the medicine does not breach public peace or endanger others."

Of great significance in the Court's analysis was the Montana Rights of the Terminally Ill Act (Terminally Ill Act).

> The Terminally Ill Act, by its very subject matter, is an apt starting point for understanding the legislature's intent to give terminally ill patients . . . end-of-life autonomy, respect and assurance that their life-ending wishes will be followed. The Terminally Ill Act expressly immunizes physicians from criminal and civil liability for following a patient's directions to withhold or withdraw life-sustaining treatment.

The Court further wrote that "[t]he Terminally Ill Act, in short, confers on terminally ill patients a right to have their end-of-life wishes followed, even if it requires *direct* participation by a physician through withdrawing or withholding treatment."

The Court concluded that it found nothing in Montana case law or statute that indicated physician aid in dying is against public policy. Relying on the Terminally Ill Act, it concluded:

> The Terminally Ill Act explicitly shields physicians from liability for acting in accordance with a patient's end-of-life wishes, even if the physician must actively pull the plug on a patient's ventilator or withhold treatment that will keep him alive. There is no statutory indication that lesser end-of-life physician involvement in which the patient commits the final act, is against public policy. ***We therefore hold that under § 45-2-211, MCA, a terminally ill patient's consent to physician aid in dying constitutes a statutory defense to a charge of homicide against the aiding physicians when no other consent exceptions apply.*** (Emphasis supplied.)